Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979

No. ~~79~~ 79-1937

WALNUT PROPERTIES, INC., a California corporation,
*Petitioner,*

*vs.*

LONG BEACH CITY COUNCIL,
*Respondent.*

**Petition for a Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Two.**

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IN THE

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October Term, 1979

No. _____

WALNUT PROPERTIES, INC., a California corporation,

*Petitioner,*

*vs.*

LONG BEACH CITY COUNCIL,

*Respondent.*

**Petition for a Writ of Certiorari to the Court of Appeal, State of California Second Appellate District, Division Two.**

Petitioner, WALNUT PROPERTIES, INC., a California corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, entered in the above entitled case on January 11, 1980. A timely petition for hearing was denied by the California Supreme Court on March 13, 1980.

## Opinions Below.

The judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Two, is reported, *Walnut Properties, Inc. v. Long Beach City Council,* 100 Cal.App.3d 1018, 161 Cal.Rptr. 411 (1980).

**Jurisdiction.**

The Judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, was rendered on January 11, 1980. (Appendix "A"). On March 13, 1980, the Supreme Court of the State of California denied a timely filed petition for hearing. (Appendix "B"). The time within which this petition may be filed is therefore June 11, 1980. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257(3).

**Questions Presented.**

1. Whether the Court below committed constitutional error in violation of the free speech and press provisions of the First and Fourteenth Amendments and the due process and equal protection provisions of the Fourteenth Amendment by upholding the ordinance herein (L.B.Mun.Code § 9120.41) under the "mere rationality" test where, as here, respondent revoked petitioner's license to operate a theater — a First Amendment forum entitled to special protection under the First Amendment — solely because petitioner had exhibited non-obscene erotic films therein.

2. Whether the ordinance herein (L.B.Mun.Code § 9120.41), on its face and as construed and applied to petitioner, violates the freedom of speech and press provisions of the First and Fourteenth Amendments and the due process and equal protection provisions of the Fourteenth Amendment because:

A. It has the purpose and effect of suppressing or greatly restricting access to non-obscene motion picture films dealing with sex.

B. It invidiously discriminates between motion picture theaters exhibiting constitutionally protected speech solely on the basis of the content of the expression, which classification is not necessary to further

any compelling state interest, and is not even rationally related to any substantial state interest.

C. It is overly broad and vague.

D. It retroactively denies petitioner the right to operate its theater, notwithstanding the fact that petitioner had obtained a theater license prior to the enactment of said ordinance.

**Constitutional and Statutory Provisions Involved.**

1. The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make to law . . . abridging the freedoms of speech, or of the press. . . . "

2. The Fourteenth Amendment to the United States Constitution reads in relevant part:

> "No state shall . . . deprive any person of . . . liberty or property, without due process of law; nor deny to any person . . . equal protection of the laws."

3. Long Beach Zoning Ordinance No. C-5360, Long Beach Municipal Code § 9120.41, is attached as Appendix "A" to the opinion of the Court below. (Appendix "A", pgs. 10-12).

4. The relevant portion of the Long Beach License Ordinance (Long Beach Mun. Code § 6100.224) is attached as Appendix "C".

**Statement of the Case.**

On August 6, 1977, petitioner made written application to the Business License Division of the City of Long Beach for issuance of a license to operate a motion picture theater at 4501 East Carson Street, Long Beach, California. The application correctly declared that there had been a change in the ownership of the business and that a motion picture theater had been on-premises and operating for approxi-

mately 25 years. At all times, the location was and is zoned to permit the operation of a motion picture theater. On August 31, 1977, pursuant to such application, respondent issued to petitioner a motion picture theater license for said location. At the time the license issued, there was not in existence any law differentiating between theaters exhibiting general release films and theaters exhibiting "adult" films.

On October 25, 1977, Ordinance No. C-5360 was passed by respondent prohibiting the "establishment" of a motion picture theater exhibiting "adult" films in certain areas. The ordinance became effective on November 25, 1977. Petitioner was then in the process of remodeling its theater. When the remodeling was completed, on December 10, 1977, petitioner commenced exhibiting constitutionally protected "adult" films. On February 7, 1978, respondent initiated proceedings to revoke petitioner's license to operate a motion picture theater on the ground that it was operating, allegedly, in violation of Ordinance No. C-5360.

The record accompanying the enactment of the Long Beach ordinance makes it crystal clear that the ordinance had the purpose and effect of suppressing or greatly restricting motion picture theaters exhibiting "adult" films. The City Planning Commission minutes of September 15, 1977 reflect that Dennis Eschen, acting Zoning Director, stated:

> "With the proposed ordinance, staff believes [adult entertainment] will end up in fairly out-of-the-way locations that are not generally travelled by a major population use visible to the City; they will be directed away from nearly all linear commercial areas."

At another point, the City Planning Department, discussing the ordinance at bar, reported to the Planning Commission on September 15, 1977, as follows:

> "Although the area of the City with linear (or stripped) commercial zoning backing up to residential zoning would be too close to residential zones to be available for adult entertainment sites, *potential sites* would still exist in several commercial nodes and in the industrial area of the City." [emphasis added].

On February 22, 1978 and March 1, 1978, a hearing was held before an administrative hearing examiner to determine if petitioner's motion picture theater license should be revoked on the ground that petitioner allegedly violated the ordinance here at issue. Following the filing of memoranda of points and authorities by both sides, the administrative hearing examiner issued his report on April 21, 1978 concluding:

A. That petitioner, after the effective date of the ordinance, had exhibited films with "specified sexual activities" within the meaning of section 2 of the ordinance.

B. That petitioner, in violation of the ordinance, exhibited such films within 500 feet of an area zoned for residential use and within 1,000 feet of a public school, *i.e.*, Long Beach City College.

The hearing examiner relying on *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 rejected petitioner's contention that the ordinance on its face and as construed and applied violated the free speech and press, due process, and equal protection provisions of the federal and state constitutions but stated:

> "It appears to the Hearing Officer that there is a serious question of vagueness in a portion of section 9120.41. The Council's attention is called to subsection (c)3 which provides in part that it shall be unlawful to establish an adult entertainment business if the location is within '1,000 feet of . . . any non-commercial establishment operated by a bona fide religious organi-

zation, or any establishment likely to be used by minors.' "

The hearing examiner also rejected petitioner's contention that it was "grandfathered" under the ordinance since it had obtained a motion picture theater license on August 31, 1977, approximately 3 months before the ordinance became effective. The hearing examiner concluded that petitioner was not deprived of any of its rights when respondent sought to revoke the license "lawfully applied for and lawfully issued for the conduct of a lawful business upon the basis of a zoning ordinance enacted subsequent to the issuance of the license." Finally, the hearing examiner rejected petitioner's contention that the waiver provision of the ordinance vested respondent's Zoning Commission with totally unfettered discretion to determine whether a motion picture theater, exhibiting constitutionally protected films dealing with sex could operate in an area zoned for motion picture theaters. The hearing examiner concluded that petitioner had no standing to complain of any constitutional shortcoming of the waiver provision since petitioner had not applied for a waiver.

On May 9, 1978, respondent concurred with the recommendation of the hearing officer and revoked petitioner's license to operate a motion picture theater.

On June 19, 1978, petitioner filed a petition for writ of mandate in the Superior Court in and for the County of Los Angeles, State of California, alleging, *inter alia*, that the ordinance, on its face and as construed and applied, violated freedom of speech and press, due process and equal protection of the law guaranteed by the First and Fourteenth Amendments to the United States Constitution. Following hearing, the Superior Court filed its Findings of Fact and Conclusions of Law on August 21, 1978 concluding, *inter alia*, that the ordinance is constitutionally valid on its face

and as applied and that the revocation of petitioner's license was lawful.

Petitioner duly appealed to the Court of Appeal of the State of California, Second Appellate District, Division Two. That Court decided that except for petitioner's argument that as applied to petitioner, all contentions raised by petitioner were considered and resolved by *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 in favor of respondent. In reaching this conclusion, the Court below ignored the following differences between the case at bar and *Young*:

1. Petitioner's theater presents no problem of "concentration" of adult theaters in a downtown area, or of creating an "urban jungle." The zoning ordinance was applied to petitioner because it operated a theater exhibiting adult films within 500 feet of an area zoned for residential use and within 1,000 feet of a public school, *i.e.*, Long Beach City College.

2. Unlike *Young*, the ordinance at bar had the purpose and effect of suppressing or greatly restricting access to constitutionally protected films dealing with sex by prohibiting the establishment of any new "adult" theaters within the populated area of Long Beach. Under the ordinance, adult theaters were directed away from "nearly all linear commercial areas" and relegated to "several commercial nodes" and to the industrial area of the city.

3. In *Young*, there was "no claim that distributors or exhibitors of adult films [were] denied access to the market or, conversely, that the viewing public [was] unable to satisfy its appetite for sexually explicit fare." There is such a claim in the case at bar.

4. In *Young*, the Court held that the proponents of the ordinance there involved had shouldered the burden of making a record establishing a sufficient state interest to justify

the prohibition of theaters exhibiting adult films in an area zoned for theaters. In the case at bar, respondent failed to make such a record. Instead of making its own study, respondent relied on a study made by the City of Los Angeles. Petitioner's theater would be *permitted* under the Los Angeles "adult entertainment" ordinance, since Los Angeles does not prohibit an adult theater within 500 feet of a residentially zoned area or within 1,000 feet of a community college.

The Court below also rejected petitioner's contention that the ordinance is unconstitutionally vague and broad, stating that this approach was rejected in *Young* on the basis that the ordinance involved in that case did *not* "have a significant deterrent effect on the exhibition of films protected by the First Amendment." The Court below, however, overlooked the respondent's own findings that under its ordinance adult theaters "will end up in fairly out-of-the-way locations" away from "major population" areas. Since all new adult theaters will be directed away from populated commercial areas and relegated to industrial areas, it follows that the ordinance does in fact restrict access to adult films for those persons who desire to view them, and that the ordinance does significantly impinge upon first amendment rights.

The Court below stated that "if the validity of the legislative classification . . . is fairly debatable, the courts will not interfere with the municipality's determination of policy," ignoring the fact that a commercial theater is presumptively under the protection of the First Amendment and that any regulation of a motion picture theater must be measured by First Amendment standards. In treating a motion picture theater like a pawn shop the Court ignored the admonition of Justice Powell, who stated in *Young* that even when zoning is "used to preserve the character of specific

areas of a city'' it enjoys no ''immunity from searching constitutional scrutiny.''

As previously noted, a timely filed petition for hearing in the California Supreme Court was denied on March 13, 1980.

**How Federal Questions Were Presented.**

From the first, petitioner alleged that its rights to freedom of speech and press, due process and equal protection, protected by the First and Fourteenth Amendments to the United States Constitution were being infringed. In its Memorandum of Points and Authorities filed in the administrative hearing in opposition to revocation,[1] petitioner stated that ''the ordinance is a clear violation of the guarantees of free speech found in the United States and California Constitutions'' and ''that it may not be the basis of any governmental action in regulating or denying the operation of a motion picture theater.'' (pgs. 1-2). Petitioner argued that the case at bar differs from *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, because in *Young* the ordinance was not challenged on the ground that it had the effect of suppressing or greatly restricting access to constitutionally protected films dealing with sex. In the case at bar, the ordinance was challenged on that ground. (pg. 4). Petitioner pointed out that in order to obtain a license to operate an adult theater in Long Beach under the ordinance, it was necessary to ''find some location within the City of Long Beach which is precisely in the center of a circle with an area of 3,142,592 square feet, or approximately 72 acres. There is no such place in Long Beach. . . .'' (pg. 5). Pe-

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[1]Exhibit ''F'' to the Petition for Writ of Mandate filed in the Superior Court in and for the County of Los Angeles, State of California.

titioner, relying on decisions of this Court, also argued that the standards of the ordinance are overly broad and vague.

The hearing examiner, in his opinion[2] recommending the revocation of petitioner's motion picture theater license, stated that petitioner "contends that the ordinance is invalid as an unlawful restriction upon free speech", but rejected that contention relying on *Young*.

Petitioner, in its petition for writ of mandate in the trial court, alleged that the ordinance "is an invalid restraint upon activity protected by the constitutional guarantee of free speech." [C.T. 3].[3] The petition for writ of mandate also alleged that respondent's decision "violates the First and Fourteenth Amendments of the United States Constitution" and that if respondent's decision is executed "petitioner's exercise of freedom of expression will be disrupted." [C.T. 3].

Petitioner, in its argument in support of the petition for writ of mandate, urged that the ordinance is an unconstitutional infringement of the right of free speech because, inter alia, it purports "to regulate the exhibition of motion pictures, an activity which is, beyond question, presumptively within the guarantee of freedom of speech. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502." [C.T. 9]. Petitioner also alleged that the ordinance "fails to comply with any of the standards necessary for regulating activities protected by the First Amendment of the United States Constitution." [C.T. 9]. Additionally, petitioner alleged that the ordinance, which is a penal statute, is unconstitutionally vague, citing, inter alia, *Connolly v. General Construction Co.*, 269 U.S. 385; *Smith v. Gougen*, 415 U.S. 566, 572-

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[2]Exhibit "H" to the Petition for Writ of Mandate filed in the Superior Court of the County of Los Angeles, State of California.

[3]C.T. refers to the Clerk's Transcript in the Court below.

573; and *Hynes v. Mayor of Oradell*, 425 U.S. 610. [C.T. 9-10]. See also C.T. 10 (''Not only is the code section . . . penal in nature, but it also restricts the exercise of first amendment rights.''); C.T. 13 (the ''provisions are so vague as to allow totally unfettered discretion to the Planning Commission''); C.T. 14 (the ordinance ''is unconstitutional as a prior restraint on first amendment activity''); C.T. 15 (''this ordinance gives officials unlimited discretion to grant licenses or permits to people whose views are acceptable to them, but deny or revoke licenses or permits to people whose views are more controversial.''); C.T. 17 (''the regulation limiting first amendment activity is based on speculation and fear.''); C.T. 18 (respondent's justification for the ordinance demonstrate that it was intended to suppress ''that which the first amendment was designed to protect. This is not a content neutral regulation or purpose.''); C.T. 21 (the ordinance ''is a clear violation of the guarantees of free speech and due process found in the United States and California Constitutions.'').

When the petition for mandate came on for hearing, the trial court raised a procedural matter saying:

> ''I would be interested in comment . . . that it is appropriate in a proceeding for alternative writ of mandate to seek to declare unconstitutionality of a statute either on its face or by virtue of its application to the particular case, and that that would be more appropriately done if the writ of mandate were coupled with the cause of action for declaratory relief.'' [R.T. 2].[4]

Pursuant to the Court's suggestion, the parties entered into a stipulation that the petition for writ of mandate be amended to add a cause of action for declaratory relief, the petitioner contending that the ordinance is unconstitutional

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[4]R.T. refers to the transcript of proceedings, July 12, 1978.

on its face or as applied to it. The Reporter's Transcript reveals that petitioner continuously invoked the protection of the federal constitution. ("[W]hen the law or regulation which is challenged on its face is substantially encroaching upon first amendment protected activity, the Court may consider the measure as it applies to others." R.T. 6). After arguing that petitioner had "established" its business before the ordinance became effective, petitioner stated: "If you don't read this as a grandfather clause . . . the ordinance would also fail on that ground. . . . And you would have the after-acquired disability problem . . . in a first amendment protected area." (R.T. 11). Petitioner, alleging that the waiver provisions of the ordinance are vague, stated: "They give the most unfettered discretion you can imagine to a city body. . . . What a great opportunity for censorship which every court—the United States Supreme Court, including in *Young*, has never changed their views about that. . . . You can't give unfettered discretion in the first amendment area. . . . *Erzoznick* . . . held that you couldn't allow this discretion. . . . That was United States Supreme Court that said you can't have discretion, and that was the same court that decided *Young*."

The trial court concluded that the ordinance "is constitutionally valid on its face and as applied; and as a proper land use regulation is not vague or otherwise invalid." (C.T. 137).

In the Court below, petitioner, in its briefs, continuously asserted that the ordinance on its face and as construed and applied to it violated its federal constitutional rights. The Court below acknowledged this, stating that petitioner "seeks to invalidate the entire ordinance on the grounds that it is an unconstitutional regulation of constitutionally protected conduct. It raises the additional contention that the ordinance is vague, overbroad, and invests public officials

with excessive discretion in enforcing of the terms of the ordinance.'' (Appendix ''A'', p. 2). The Court below considered and rejected petitioner's claim that the ordinance, on its face and as construed and applied, violated the First and Fourteenth Amendments to the United States Constitution, relying solely on *Young* (Appendix ''A'', p. 2).

## REASONS FOR GRANTING THE WRIT.

Contrary to the view of the Court below, the basic issues involved in this case were not considered, or disposed of, in *Young*. In *Young*, Justice Powell warned that "courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression." (427 U.S. at 84). The case at bar does involve a direct effect of zoning on expression, and the use of the power to zone as a pretext for suppressing expression.

1. The Long Beach zoning ordinance has the purpose and effect of suppressing or greatly restricting motion picture theaters exhibiting adult films and thus restricting access to constitutionally protected films for those persons who desire to view non-obscene films dealing with sex. Under the ordinance, "adult" theaters will not be in any area travelled by significant number of persons. For all practical purposes, they will be relegated to "the industrial area of the city" where persons are unlikely to go.

In *Young*, Justice Stevens, speaking for the plurality, expressly stated that the result in that case would have been different "if the ordinance had the effect of suppressing or greatly restricting access" to constitutionally protected material dealing with sex. (427 U.S. at 71, n. 35).

Justice Powell, concurring, stated that if a zoning ordinance does significantly reduce the number or accessibility of theaters presenting constitutionally protected films dealing with sex, a different result would be called for. (427 U.S. at 81, n. 4). Justice Powell continued that "if that had been its purpose, or . . . effect . . . the case might be analogous to those cited by Mr. Justice Stewart's dissent."

Justice Stewart's dissent (joined by Justices Brennan, Marshall and Blackmun) stated:

> "The case does not involve a simple zoning ordinance, or a content—neutral time, place, and manner restriction, or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment. . . . What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. . . . I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as I am, to the well-intentioned efforts of Detroit to 'clean up' its streets and prevent the proliferation of 'skid rows.' But it is in those situations where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height."
> (427 U.S. at 84-87).

The ordinance at bar zones out all new "adult" theaters within 500 feet of a residentially zoned area. A somewhat similar provision in the ordinance involved in *Young* was found unconstitutional by the district court. In *Norton Theater Incorporated v. Gribbs*, 373 F.Supp. 363, 370 (E.D. Mich. S.D. 1974) the Court stated:

> "[T]he effect of the restriction is an almost total ban on uses conceded by the defendants to be lawful. While such an extreme effect might not render the restriction invalid under the equal protection clause if the City had demonstrated that its compelling interest was promoted thereby, no such showing has been made. We conclude that the 500-foot restriction is not necessary to promote any expressed compelling state interest and is therefore invalid under the equal protection clause."
>
> See *Young, supra*, 427 U.S. at 52, n. 2.

The same may fairly be said of the like 500-foot restriction found in the zoning ordinance at bar. Moreover, Long Beach did not make its own study, prior to enacting its ordinance. Instead, it relied heavily on a study made by the City of Los Angeles prior to the time Los Angeles enacted its "adult entertainment" ordinance.

Los Angeles does not have a prohibition against the operation of an adult theater within 500 feet of any area zoned for residential use.[5]

Los Angeles, unlike respondent, understood that *Young* did not give cities a blank check to severely limit adult theaters in the name of zoning. Its *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* prepared by the Department of City Planning, City of Los Angeles, June 1977, (City Plan Case No. 26475, Council File No. 74-4521-S.3) states (pg. 2): "The United States Supreme Court in *Young vs American Mini Theaters* pointed out, as one of the bases for upholding the Detroit ordinance, that the regulation did not limit the number of 'adult entertainment' businesses. Our study has indicated that the practical effect of literal adoption of 'Detroit' language without modification in the City of Los Angeles would be to limit the potential locations for such businesses rather severely. Due to the predominance of commercial zoning in 'strips' along major and secondary streets, an ordinance preventing 'adult entertainment' business from locating within 500 feet of residentially zoned property would, in effect, limit such businesses to those areas of the

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[5]Los Angeles Ordinance No. 151,294C (§ 12.70C) reads: "No person shall cause or permit the establishment . . . of an . . . adult motion picture theater . . . within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." Under the Los Angeles ordinance, a public school does *not* include "a community or junior college, college or university." See footnote 7, *infra*.

City where there is commercial zoning of greater than 500 feet in depth. Areas with such commercial frontage would include downtown Los Angeles, a small part of Hollywood, Westwood, and Century City." The effect of the Long Beach ordinance is an almost total ban on new adult theaters. An analysis of the four opinions in *Young* reveals that every member of the Court agrees that such an ordinance cannot survive.

In *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696 (M.D. Fla., Jacksonville Div. 1978) the Court invalidated a zoning ordinance found to have the effect of suppressing or greatly restricting theaters exhibiting "adult" films and thus restricting access to constitutionally protected films dealing with sex, saying:

> "In the court's view, this fact more than amply distinguishes the Jacksonville zoning scheme from the type of permissible inverse zoning approved in *Young*. In its practical effect, the Jacksonville ordinance precludes access to the market in adult materials by anyone other than those who now market those materials in their present locations. Under both the plurality and specially concurring opinions in *Young*, this denial of access to the adult entertainment market would eliminate a crucial underpinning of the analysis by which the court sustained the validity of Detroit's zoning scheme." (450 F.Supp. at 702).

In *Universal Amusement Co., Inc. v. Hofheinz*, 616 F.2d 202 (5th Cir. 1980), the Court awarded attorneys' fees after the district court declared Houston's adult entertainment ordinance unconstitutional. The Houston ordinance prohibited the operation of adult commercial establishments within 2,000 feet of any church, school or any other educational or charitable institution. The Fifth Circuit noted that the district court held "the ordinances were vague and over-

broad, violated the First and Fourteenth Amendments, and denied Universal due process and equal protection." (616, F.2d at 204).

2. In considering the validity of the zoning ordinance at bar, the special status of a motion picture theater, exhibiting constitutionally protected films, must be considered. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, the Court noted that corporations engaged "in the business of communication or entertainment enjoy first amendment rights." As the Court explained, its "decisions involving corporations in the business of communication or entertainment are based not only on the role of the first amendment or in fostering individual self-expression but also on its role in affording the public access to the dissemination of information and ideas." (435 U.S. at 783). In *Bellotti*, Chief Justice Burger, concurring, asserted that the Press Clause of the First Amendment focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion.' " (435 U.S. at 801). Under this Court's decisions, a motion picture theater exhibiting constitutionally protected films enjoys the same first amendment rights as a newspaper. See *Bellotti, supra*, 435 U.S. at 800 (Chief Justice Burger concurring).

The setting of a commercial theater is "presumptively under the protection of the first amendment." *Roaden v. Kentucky*, 413 U.S. 496, 504. In *Vance v. Universal Amusement Co.*, 445 U.S. ___, 100 S.Ct. 1156, 1160, the Court again recognized the special status of a motion picture theater, stating that "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance."

The freedom to operate a theater is unquestionably protected by the First Amendment because preservation of freedom of expression requires protection of the means of disseminating expression. *Lovell v. City of Griffin*, 303 U.S. 444; see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-65, n. 6; see also *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 56, n. 3 (Chief Justice Warren dissenting). It is thus plain that a zoning law, applicable to a motion picture theater, like a zoning law applied to a church, must be measured by first amendment standards. In *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Roslyn Harbor*, 38 N.Y.2d 283, 342 N.E.2d 534 (1975), the Court was confronted with the question of whether a village may, by zoning ordinance, establish "fixed setback requirements" applicable to religious institutional uses in an area zoned for residences. As the Court saw it, the ultimate question was whether the ordinance, on its face or as applied, restricts "religious uses without recognizing their special protected status under the first amendment. So phrased, the question is clearly the same one which must always be asked when the exercise of the police power conflicts with the exercise of a first amendment right." (342 N.E.2d at 538). The Court concluded that the City did not meet its high burden justifying its ordinance. See also *Church of Christ v. Metropolitan Board of Zoning*, 371 N.E.2d 1331 (Court of Appeals of Indiana, 1978) ("The exclusion of a church from a residential area by a zoning ordinance is a violation of the fundamental right of freedom of worship protected by the First and Fourteenth Amendments to the United States Constitution. . . .").

Whatever power a municipality may have to apply its zoning laws to churches, taking into account the special protected status churches have under the First Amendment, it is unthinkable that this Court would uphold an ordinance

which differentiated between churches, based upon its religious tenets. A number of state courts have invalidated state action that had excluded religious groups because of disagreement with their beliefs, or because of other discriminatory grounds. See *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals of Chicago*, 25 Ill. 65, 182 N.E.2d 722 (1962); *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959); *North Shore Unitarian Society v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup.Ct. Nassau County, 1951); *State ex rel. Synod of Ohio Lutheran Church v. Joseph*, 139 Ohio S.T. 229, 39 N.E.2d 515 (1942).

Similarly, this Court would not countenance an ordinance which differentiated between churches based upon the color of the skin of those attending. To permit, for example, a white Protestant church while prohibiting a church attended primarily by Blacks because the latter allegedly has secondary "objectionable characteristics" would be intolerable and could not be squared with the commands of the First Amendment. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, the Court stated: "If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of *Buchanan v. Warley*, 245 U.S. 60, where the Court invalidated a city ordinance barring a Black from acquiring real property in a white residential area. . . ." (416 U.S. at 6). In *Buchanan*, the City sought to justify its discriminatory ordinance in the exercise of the police power, asserting that "it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color." (245 U.S. at 74). In the case at bar, the question is the propriety of permitting some theaters to operate within 500 feet of a residentially zoned

area while excluding others. To paraphrase Chief Justice Burger's remarks in *Bellotti, supra*:

> "The very task of including some [theaters] within the 'institutional press' while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stewart England — a system the First Amendment was intended to ban from this country. *Lovell v. Griffin*, 303 U.S. at 451-452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression. . . . Yet nothing in this Court's opinions supports such a confining approach to the scope of the Press Clause." (435 U.S. at 801).

A motion picture theater — part of the "press" protected by the first amendment — does not lose its first amendment rights by exhibiting constitutionally protected films dealing with sex. "The portrayal of sex, e.g., in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 343 U.S. 476, 487. See also *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688, 689.

In *Young*, a majority of the Court was of the view that non-obscene erotic materials may not be treated differently under the first amendment principles from other forms of protected expression. (*See* footnote 1 of Justice Powell's concurring opinion and the dissenting opinion of Justice Stewart concurred in by Justices Brennan, Marshall and Blackmun). Even if non-obscene, erotic films are deemed

to have a diminished first amendment value, the exhibition of such constitutionally protected films would not deprive the theater of its first amendment rights. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96. . . . Such power in government to channel the expression of views is unacceptable under the first amendment." *Bellotti, supra*, 435 U.S. at 784, 785. Since the zoning ordinance at bar impinges directly on first amendment rights, the question of its constitutionality turns on whether it can survive "the exacting scrutiny necessitated by a state imposed restriction of freedom of speech. . . . and the burden is on the government to show the existence of such an interest. . . . Even then, the state must employ means closely drawn to avoid unnecessary abridgement." *Bellotti, supra*, 435 U.S. at 784-785.

The Court below did not subject the zoning ordinance to the critical scrutiny demanded under accepted first amendment and equal protection principles.

3. The Court below was of the view that there was no difference between regulating a motion picture theater and any other business, stating: "If the validity of the legislative classification for zoning purposes is fairly debatable, the courts will not interfere with the municipality's determination of policy. . . . The thrust of Justice Stevens' opinion in *Young* was that it was . . . within the City's power to classify theaters according to the content of the films exhibited so long as the classification has a reasonable basis. . . . Walnut has presented no evidence that the City's ordinance in any way restricts or eliminates the access to the 'adult entertainment' for those persons who desire to patronize it." (Appendix "A", pgs. 4, 5). Petitioner re-

spectfully insists that the Court below seriously misconstrued Justice Stevens' position. In the first place, Justice Stevens assumed in *Young* that the ordinance did not significantly reduce the number or accessibility of adult theaters, expressly stating that the result in that case would have been different if the ordinance had that effect. (427 U.S. at 71, n. 35). Moreover, he noted with apparent approval that the district court opinion, which was affirmed, had utilized the "strict scrutiny" test. (427 U.S. at 56, n. 12).

The Court below relied on *Village of Belle Terre v. Boraas*, 416 U.S. 1 to justify its utilization of the "mere rationality" test. In doing so, however, the Court failed to consider the impact of the more recent case of *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494.

In *Belle Terre*, the Court held that the zoning ordinance there involved did not affect fundamental constitutional rights and was not subject to strict judicial scrutiny. In *Moore*, on the other hand, the Court held that the ordinance did affect fundamental constitutional rights, and that accordingly "the usual judicial deference to the legislature is inappropriate." (431 U.S. at 499). When government intrudes on fundamental rights "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.*

It is plain that under the strict scrutiny test, the ordinance, which has been invoked to revoke petitioner's license to operate a motion picture theater because it is within 500 feet of a residentially zoned area and within 1,000 feet of a college, must fail. Initially, it should be observed that the primary purpose of the ordinance at bar "is to prevent the concentration or clustering of [adult entertainment] businesses in any one area." L.B.Mun.Code § 9120.41(a).

Petitioner's theater is *not* close to any other "adult entertainment" business.

The Court below adverted to the conceivable state interests justifying the ordinance at bar, as applied to petitioner by stating that it was passed "to insure that 'adult entertainment' businesses 'will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area.' (L.B.Mun.Cod., § 9120.41(a) )." (Appendix "A", pg. 4). The Court did not spell out any state interest served by prohibiting petitioner from operating its theater exhibiting constitutionally protected films in an area *away* from any other "adult entertainment" business. The Long Beach City Council itself made no study demonstrating that a single adult theater, in an area zoned for theaters, presents any significant or substantial problem when it is within 500 feet of a residentially zoned area or 1,000 feet of a college. As already noted, respondent relied on a study conducted by the City of Los Angeles which culminated in a Los Angeles City "adult entertainment" ordinance. Los Angeles, however, *permits* adult theaters within 500 feet of a residentially zoned area, and within 1,000 feet of a college.[6]

Even though respondent did not conduct any study justifying the virtual prohibition of any newly "established" theaters exhibiting adult films in any populated area of Long Beach, it did make a "finding" purportedly justifying treating adult theaters differently then other theaters.

Section 9120.41(a) reads:

> "*Regulated Uses*. The City Council finds that 'adult entertainment' businesses because of their very nature, are recognized as having objectionable operational

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[6]See footnote 5, *supra*.

> characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent area. Special regulation of these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any area."

By themselves, these words hardly justify the restrictions that petitioner contests here. The record herein is totally devoid of any showing that prohibiting theaters exhibiting adult films, while permitting other theaters, within 500 feet of a residentially zoned area or 1,000 feet of a college, truly and substantially "contribute to the blighting or downgrading of the surrounding neighborhoods." Similarly, there is nothing in the record to support a conclusion that adult theaters in Long Beach have "objectionable operational characteristics", nor does the ordinance identify what those characteristics may be. Likewise, there is nothing in the record to establish that the "operational characteristics" of an adult theater in Long Beach are in any fashion different than the "operational characteristics" of any other motion picture theater in Long Beach.

In *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 100-101, the Court stated:

> "Predictions about imminent disruption from picketing involved judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. '[I]n our system, undifferentiated fear or apprehension of distur-

bance is not enough to overcome the right to freedom of expression.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 508."

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, the Court struck down the ordinance there involved because the township had not sustained its burden justifying intrusion on first amendment rights. The Court stated: "[R]espondents have not demonstrated that the place or manner of the speech produces a detrimental 'secondary effect' on society, *Young v. American Mini Theaters*. . . . The record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community. . . . And the record does not confirm the township's assumption that proscribing such signs will reduce public awareness of realty sales and thereby decrease public concern over selling." (431 U.S. at 94-96).

In the case at bar, petitioner contends that respondent has no legitimate interest, much less a compelling or substantial interest, in prohibiting it from operating its theater within 500 feet of a residentially zoned area, in light of the fact that the location is zoned for theaters. In the name of zoning, respondent is not free to cut away first amendment freedoms because it assumes that many people will be offended by the presence in their community of a theater exhibiting "adult" films. *Erznoznik v. City of Jacksonville*, 422 U.S. 205. Similarly, the ordinance cannot be justified on the assumption that an "adult" theater will attract "rogues and vagabonds.". See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164. Justice Douglas'opinion for the Court primarily relied upon the vagueness of the ordinance but also noted that the "Jacksonville ordinance makes criminal activities which by modern standards are normally innocent."

See also *Coates v. City of Cincinnati*, 402 U.S. 611, 615-616; *Buchanan v. Warley*, 245 U.S. at 74.

Furthermore, respondent has not justified the provision of its ordinance prohibiting an adult theater within 1,000 feet of a "public school", undefined. Petitioner had its theater license revoked in part because it was within 1,000 feet of Long Beach Community College. As previously noted, the Los Angeles ordinance, upon which the Long Beach ordinance relied, defines a "public school" as *excluding* "an institution of higher education, including a community or junior college, college or university."[7]

The Long Beach ordinance does not define the meaning of a "public school." The ordinance is therefore vague, and petitioner has standing to raise this issue. *Vance v. Universal Amusement Co.*, 100 S.Ct. 1156, 1161 at fn. 12.

Moreover, the ordinance, as applied to a prohibition against having an adult theater within 1,000 feet of a college is overly broad, and without justification. College students are the last persons in the world who would be "offended" by the presence of an "adult" theater. As previously noted, the mere fact that some persons may be offended by having an adult theater within their midst cannot justify this type of ordinance. *Erznoznik v. City of Jacksonville*, 422 U.S. 205. *A fortiori* there can be no justification if there are not even persons likely to be offended.

4. The ordinance at bar is unconstitutionally vague and broad for essentially the same reasons set forth by Justice

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[7]Los Angeles Ordinance No. 151,294C defines a school as follows: "An institution of learning for *minors*, whether public or private. . . . This definition includes a nursery school, kindergarten, elementary school, junior high school, senior high school . . . but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university." [Emphasis added].

Blackmun in his dissent in *Young*. Moreover, as already noted, the hearing examiner stated that "there is a serious question of vagueness in a portion of section 9120.41. The Council's attention is called to subsection (c)3 which provides in part that it shall be unlawful to establish an adult entertainment business if the location is within '1,000 feet of . . . any noncommercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors.' " The Los Angeles ordinance does not prohibit an adult theater within 1,000 feet of "any establishment likely to be used by minors." Such a prohibition plainly has the effect, and probably the purpose, of prohibiting the establishment of any new adult theater. It would be virtually impossible to find a location zoned for theater use that did not also have within 1,000 feet an establishment "likely to be used by minors."

Additionally, the provisions of the ordinance which state that "it shall be unlawful to *establish* any such 'adult entertainment' business" in designated areas is vague as applied. Petitioner contends, and respondent denies, that petitioner "established" its "adult entertainment" business when it obtained its license on August 31, 1977. The City itself appears to have been of the view that a person obtaining a license has "established" a business within the meaning of the ordinance. A letter from the Assistant Planning Director to the Chairperson and City Planning Commissioners dated September 1, 1977 states that "staff is concerned that, once it has become public knowledge that such an ordinance is about to be adopted, a rush of applications for business licenses will occur before the effective date of any such ordinance. This would essentially ineffectuate the proposed ordinance because those businesses that had been established prior to the ordinance will not be affected by it." Petitioner has been stripped of its license

"lawfully applied for and lawfully issued for the conduct of a lawful business upon the basis of a zoning ordinance enacted subsequent to the issuance of the license." Petitioner contends that it was thus deprived of Liberty and property without Due Process of law.

**Conclusion.**

For the aforesaid reasons the petition for a writ of certiorari should be granted.

DATED: June 6, 1980.

Respectfully submitted,

STANLEY FLEISHMAN,
A Professional Corporation,
By STANLEY FLEISHMAN,
*Attorney for Petitioner.*

*Of Counsel:*
BRUCE S. GELBER.

## APPENDIX A.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Walnut Properties, Inc., a California corporation, Petitioner and Appellant, vs. Long Beach City Council, Respondent.

2 Civil No. 54469 (Super. Ct. No. C 244 644).

FILED: Jan. 14, 1980.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Weil, Judge. Affirmed.

Rhine, McDaniel & Thorp, for Petitioner and Appellant.

Robert W. Parkin, City Attorney, Arthur Y. Honda, Deputy City Attorney, for Respondent.

Frederick W. Clough, City Attorney for City of Santa Barbara, Amicus Curiae for Respondent.

On August 31, 1977, Walnut Properties, Inc. (Walnut) obtained a business license to operate a motion picture theatre in the City of Long Beach. Walnut had recently acquired an existing theatre from a prior owner. A business license, which is essentially a revenue-producing device, is issued subject to applicable zoning and building regulations. (L.B. Mun. Code, § 6000.9.)

Walnut opened its theatre on December 10, 1977, and shortly thereafter the City of Long Beach (City) through its City Council, instituted proceedings which culminated in the revocation of Walnut's business license in June of 1978. The basis for the revocation was a violation of the City's zoning ordinance. That ordinance had been enacted on October 25, 1977 and became effective on November 25, 1977.

This appeal followed Walnut's unsuccessful attempt in the superior court to secure a writ of mandamus compelling the City to set aside its revocation of Walnut's business license. Walnut's petition for mandate attacks the constitutionality of the zoning ordinance.

The zoning ordinance in question (L.B. Mun. Code, § 9120.41, attached hereto as Appendix A) creates a category of "adult entertainment business" and prohibits the establishment of such a business in certain locations in the City. Germane to this case is the prohibition against locating an "adult entertainment business" within 500 feet of a residential area, or 1000 feet of a public school. Walnut's theatre falls under both limitations.

Walnut concedes that it did show and plans to continue showing movies which fall within the ambit of the ordinance. Walnut has not applied for a waiver or variance from the zoning restriction. It simply seeks to invalidate the entire ordinance on the grounds that it is an unconstitutional regulation of constitutionally protected conduct. It raises the

additional contention that the ordinance is vague, overbroad and vests public officials with excessive discretion in enforcing of the terms of the ordinance.

The ordinance here is patterned after and in its key provisions is identical to an ordinance adopted in the City of Detroit, which ordinance was approved by the United States Supreme Court in *Young* v. *American Mini Theatres*, 427 U.S. 50. Except for Walnut's argument that, as applied to it, the City has improperly given the ordinance retroactive effect, all contentions raised by Walnut were considered and resolved by the *Young* court in favor of the City.

Since Walnut concedes that its operation of the theatre is an "adult entertainment business" as defined by the ordinance, it would ordinarily lack the requisite standing to challenge the ordinance for vagueness or overbreadth. Walnut seeks to avoid the impact of that principle by pointing to the fact that motion pictures are a form of speech and by characterizing the ordinance as an infringement on freedom of speech. (*Broadrick v. Oklahoma*, 413 U.S. 601; *Burton v. Municipal Court*, 68 Cal.2d 684.)

This approach was rejected in *Young v. American Mini Theatres, supra*, on the basis that the ordinance did *not* "have a significant deterrent effect on the exhibition of films protected by the First Amendment." (*Young*, at p. 60.)

"[T]he only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be 'characterized by an emphasis' on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state courts.' . . . [W]e think this is an inappropriate case in which to

adjudicate the hypothetical claims of persons not before the Court." (*Young*, at p. 61.)

The *Young* case is dispositive of the vagueness claims raised here. The same reasoning applies to the overbreadth challenge. (*Northern Cinema, Inc. v. City of Seattle*, 585 P.2d 1153.)

In the final analysis Walnut's position essentially is that the City may not create zoning regulations applicable to theatres which are based on the content of the films exhibited therein. It claims a constitutional right to exhibit any non-obscene films it chooses at the location in question.

Walnut correctly points out that motion pictures are included within the free speech and free press protection of the First Amendment. (*Joseph Burston, Inc. v. Wilson*, 343 U.S. 495; *Burton v. Municipal Court, supra.*) It does not follow, however, that a motion picture exhibitor has absolute freedom to exhibit every motion picture at any place and under any circumstances that it desires. A municipality may impose regulations upon the operation of any business including that of a motion picture theatre. (*Burton, supra.*

It is settled that general regulatory statues "*not intended to control the content of speech* but incidentally limiting its unfettered exercise, . . . when they have been found justified by subordinating valid governmental interests," do not run afoul of the First Amendment. (*Crownover v. Musick*, 9 Cal.3d 405, 419.) In particular, zoning ordinances, when reasonable in object and not arbitrary in operation, will be sustained as within the legitimate exercise of the police power. (*Hill v. City of Manhattan Beach*, 6 Cal.3d 279.) If the validity of the legislative classification for zoning purposes is fairly debatable, the courts will not interfere with the municipality's determination of policy. (*Village of Belle Terre v. Boraas*, 416 U.S. 1; *Associated Home Build-*

*ers Etc., Inc. v. City of Livermore*, 18 Cal.3d 582.) Applying these principles, we turn to examine the Long Beach ordinance.

The "adult entertainment" ordinance was passed to insure that "adult entertainment" businesses "will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area." (L.B. Mun. Code, § 9120.41(a).)

The issue of whether the ordinance is in reality a regulation of conduct protected by the First Amendment was addressed in *Young v. American Mini Theatres, supra*. The crucial element for both Justice Stevens, writing for the plurality, and Justice Powell in concurring, was that the ordinance did not restrict access to adult movies or access to the adult movie market.

The City's ordinance here, like the Detroit ordinance, does not prohibit the exhibition of any motion picture. It simply specifies the area within the city where certain well-described types of films may be exhibited.

It is clearly within the power of the City to provide that *no* motion picture theatre can be operated in a residential area or near a public school. The thrust of Justice Stevens' opinion in *Young* was that it was also within the City's power to classify theatres according to the content of the films exhibited, so long as that classification has a reasonable basis. The "adult entertainment" classification is a reasonable one.

Walnut has presented no evidence that the City's ordinance in any way restricts or eliminates the access to the "adult entertainment" for those persons who desire to patronize it. In fact, Walnut operates another such theatre in a different part of the city. From records which we may

judicially notice, it appears that Long Beach has a number of "adult" forms of entertainment operating within its boundaries.

Finally we turn to Walnut's claim that the ordinance as applied to it, has been given retroactive application. This is another way of stating the long-accepted principle that a zoning ordinance may not be used to deprive a person of a vested property right—a violation of due process. (*Raley v. California Tahoe Regional Planning Agency*, 68 Cal.App.3d 965; *Avco Community Developers, Inc. v. South Coast Regional Com.*, 17 Cal.3d 785; *Hill v. City of Manhattan Beach*, 6 Cal.3d 279.)

The City's ordinance, like most zoning ordinances, has an exemption for existing non-conforming uses. Further, it impacts only on the future establishment of "adult entertainment" businesses. The "establishment" of a new business includes relocation or conversion of an existing business. (L.B. Mun. Code, § 9120.20(c).)

While the theatre in question here, under other ownership, has been in existence for some 25 years, it previously operated as the usual neighborhood type theatre. Walnut obtained its business license on the representation that it simply intended to continue the existing type of operation, exhibiting "family" type films. The theatre was in fact closed for remodeling at the time Walnut obtained its license and did not open again until well after the effective date of the new zoning ordinance.

Walnut did not acquire a vested right to operate an "adult entertainment" business by the acquisition of a closed building and a business license to operate a motion picture theatre. In other words, the property was not being put to a lawful use which use continued up to and after the time the use became unlawful or non-conforming. (*Hill v. City of*

*Manhattan Beach, supra;* also see *Benson* v. *City of Long Beach,* 61 Cal.App.2d 189, and *Raley* v. *California Tahoe Regional Planning Agency, supra*).

We view Walnut's situation as no more of a hardship than that imposed on the property owner in *HFH, Ltd.* v. *Superior Court,* 15 Cal.3d 508. There the property owner acquired land zoned for commercial use at a purchase price in excess of $500,000. The intent was to construct a shopping center. Before construction commenced the City "down-zoned" the property to residential, single family dwellings, thereby reducing the value of the property to about one-tenth of what the property owner had paid to purchase it. In *HHH, Ltd., supra,* at page 516, our Supreme Court held that " 'A purchaser of land merely acquires a right to continue a *use instituted* before the enactment of a more restrictive zoning.' " (Emphasis added.) The court further stated that "a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging, . . ." (Page 518.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Compton
COMPTON, *J.*

We concur:

/s/ Fleming
FLEMING, *Acting P.J.*

/s/ Beach
BEACH, *J.*

APPENDIX A.

Long Beach Municipal Code Sec. 9120.41.

SECTION 9120.41—*Provisions Regulating the Location of ''Adult Entertainment'' Businesses* (a) *Regulated Uses.* The City Council finds that ''adult entertainment:'' businesses, because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area.

(b) *Definitions.*

1. For purposes of this Section, the ''adult entertainment'' businesses are defined as follows:

A. ''Adult Book Store''—An establishment having as a substantial or significant portion of its stock in trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to ''specified sexual activities'' or ''specified anatomical areas'' or an establishment with a segment or section devoted to the sale or display of such materials.

B. ''Adult Motion Picture Theater''—An enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to ''specified sexual activities'' or ''specified anatomical areas'' for observation by patrons therein.

C. ''Adult Mini Motion Picture Theater''—An enclosed building with a capacity for less than fifty persons used for presenting material distinguished or characterized by an emphasis on matter depicting or relating to ''specified sexual activities'' or ''specified anatomical areas'' for observation by patrons therein.

D. ''Adult Hotel or Motel''—A hotel or motel wherein material is presented which is distinguished or characterized by an emphasis on matter depicting, describing or relating to ''specified sexual activities'' or ''specified anatomical areas.''

E. ''Adult Motion Picture Arcade''—Any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing ''specified sexual activities'' or ''specified anatomical areas.''

F. ''Cabaret''—A nightclub, theater or other establishment which features live performances by topless and/or bottomless dancers, ''go-go'' dancers, exotic dancers, strippers, or similar entertainers, where such performances are distinguished or characterized by an emphasis on ''specified sexual activities'' or ''specified anatomical areas.''

G. ''Massage Parlor''—Any establishment licensed as a massage parlor pursuant to Section 6223.1 of the Long Beach Municipal Code where, for any form of consideration or gratuity, massage, alcohol rub, administration of fomentations, electric

or magnetic treatments, or any other treatment or manipulation of the human body occurs.

H. ''Model Studio''—Any business where, for any form of consideration or gratuity, figure models who display ''specified anatomical areas'' are provided to be observed, sketched, drawn, painted, sculptured, photography, or similarly depicted by persons paying such consideration or gratuity.

I. ''Sexual Encounter Center''—Any business, agency or person who, for any form of consideration or gratuity, provides a place where three or more persons, not all members of the same family, may congregate, assemble or associate for the purpose of engaging in ''specified sexual activities'' or exposing'' specified anatomical areas.''

J. Any other business or establishment which offers its patrons services or entertainment characterized by an emphasis on matter depicting, describing or relating to ''specified sexual activities'' or ''specified anatomical areas.''

2. For purposes of this Section, ''specified sexual activities'' shall include the following:

A. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral anal copulation, beastiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following depicted sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

B. Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence; or

C. Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

D. Fondling or touching of nude human genitals, pubic region, buttocks or female breast; or

E. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

F. Erotic or lewd touching, fondling or other contact with an animal by a human being; or

G. Human excretion, urination, menstration, vaginal or anal irrigation.

3. For purposes of this Section, ''specified anatomical areas'' shall include the following:

A. Less than completely and opaquely covered (1) human genitals, pubic region; (2) buttock, and (3) female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(c) *Special Regulations*. In those land use districts where the ''adult entertainment'' businesses regulated by this Section would otherwise be permitted uses, it shall be unlawful to establish any such ''adult entertainment'' business if the location is:

1. Within five hundred feet of any area zoned for residential use;

2. Within one thousand feet of any other ''adult entertainment'' business; or

3. Within one thousand feet of any public or private school, park, playground, public building, church, any non-commercial establishment operated by a bonafide religious organization, or any establishment likely to be used by minors.

The ''establishment'' of any ''adult entertainment'' business shall include the opening of such a business as a new business, the relocation of such business, or the conversion

of an existing business location to any ''Adult entertainment'' business use.

(d) *Waiver of Locational Provisions.*

1. Any property owner or his authorized agent may apply to the Planning Commission for a waiver of any locational provisions contained in this Section. The Planning Commission, after a hearing, may waive any locational provision, if the following findings are made:

A. That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Section will be observed;

B. That the proposed use will not enlarge or encourage the development of a ''skid row'' area;

C. That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal;

D. That all applicable regulations of this Code will be observed.

2. The procedure for this hearing shall be the same as that provided in Section 9120.25 of the Municipal Code, with, among other matters, the same notice requirements, the same right of appeal to the City Council, and the same fees payable by the applicant. The Planning Department shall prepare the necessary application form for this waiver.

(e) *Severability.* If any provision or clause of this Section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions or clauses or applications of this Section which can be implemented without the invalid provision, clause or application; and

to this end, the provisions and clauses of this Section are declared to be severable. (Added by Ord. C-5360, 10-25-77).

## APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

I have this day filed Order MARCH 13, 1980, HEARING DENIED.

In re: 2 Civ. No. 54469. Walnut Properties, Inc. vs. Superior Court, Los Angeles.

Respectfully,
G. E. BISHEL, Clerk.

## APPENDIX C.

Long Beach Municipal Code Section 6100.224.

SECTION 6100.224—*Suspension and Revocation of Business License or Permit*

(a) Any license or permit to do business in the City of Long Beach may be suspended or revoked by the City Council in the manner hereinafter provided upon the following grounds:

1. The licensee or permittee or any other person has violated any provision of this Code, State or Federal Law arising out of and in connection with the practice and/or operation of the business for which the license or permit has been granted.

2. For any ground that would warrant the denial of the issuance of such license or permit if application therefor was being made.

3. The licensee or permittee or any other person under his control or supervision has maintained a nuisance which was caused by any act performed in the exercise of any rights granted by the license or permit required under the provisions of this Code.

4. The licensee or permittee, his employee, agent or any person connected or associated with licensee or permittee as partner, director, officer, stockholder or manager has knowingly made any false, misleading or fraudulent statement of material fact in the application for the license or permit required under the provisions of this Code.

5. The licensee or permittee has failed to comply with any condition which may have been imposed as a condition for the issuance of the license or permit required under the provisions of this Code.

6. The licensee or permittee has failed to pay any license fees or permit fees that are provided for under the provisions of this Code when due.

(b) The City Council, upon receipt of satisfactory evidence that any of the above grounds for suspension or revocation of said license or permit exist, shall notify the licensee or permittee in writing that a hearing on suspension or revocation of such license or permit shall be held before the City Council, the grounds of suspension or revocation, the place where the hearing will be held, and the date and time thereof which shall not be sooner than ten (10) days after service of such notice of hearing.

(c) All notices provided for herein shall be personally served upon the licensee or permittee or left at the place of business or residence of such licensee or permittee with some person over the age of eighteen (18) years having some suitable relationship to the licensee or permittee. In the event service cannot be made in the foregoing manner, then a copy of such notice shall be mailed, postage fully prepaid, addressed to the last known address of such licensee or permittee at his place of business or residence at least ten (10) days prior to the date of such hearing.

(d) The provisions herein contained relating to suspension and/or revocation of any license or permit required under the provisions of this Code, and the procedure therefor, are exclusive and any other provisions contained in this Code relating to suspension and/or revocation procedure are hereby superceded and are of no affect. (Added by Ord. C-5230, 1-6-76).

Supreme Court, U. S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term 1979**

**No. 79 - 1937**

---

WALNUT PROPERTIES, INC.,

Petitioner,

vs.

LONG BEACH CITY COUNCIL,

Respondent.

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

---

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**Long Beach City Council**

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IN THE

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No. 79-1937

WALNUT PROPERTIES, INC.,

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

---

## STATEMENT OF CASE

This case involves a zoning ordinance which regulates the location of adult entertainment businesses disseminating sexually explicit materials. The ordinance was adopted by the City of Long Beach in reliance on Young v. American Mini Theatres, Inc. (1976) 427

U.S. 50; 49 L.Ed.2d 310.

The proliferation of commercial uses which disseminate sexually explicit materials is a serious community problem which can cause a blighting effect on the quality of life in a community. In Young, supra, this Court has given to cities a vehicle to deal with this problem through a land-use zoning approach which is sensitive to both First Amendment rights of the operators of sexually explicit businesses and to a community's desire to maintain its quality of life.

It is submitted that Young is dispositive of the issues raised herein.

## STATEMENT OF FACTS

On or about August 16, 1977, Petitioner made written application to the City Tax Collector for a business license to operate a motion picture theatre.

On or about August 31, 1977, a business license was issued to Petitioner as the new owner of the theatre.

On September 6, 1977, the City Council of the City of Long Beach adopted

a temporary, emergency Ordinance No. C-5343, effective on that date, which restricted the establishment of specified adult entertainment businesses.

On October 25, 1977, the City Council enacted Municipal Code Section 9120.41, the adult entertainment ordinance which took effect on November 25, 1977. Section 9120.41 incorporated the provisions of temporary, emergency Ordinance No. C-5343.

After issuance of the business license, Petitioner did not open its theatre for business until December 10, 1977, and on that date for the first time displayed motion pictures of the character defined in Section 9120.41. Petitioner exhibited on a regular basis films which were characterized by emphasis on "specified sexual activities" or "specified anatomical areas."

On or about February 7, 1978, the City instituted proceedings to revoke Petitioner's business license pursuant to Municipal Code Section 6100.9 (formerly § 6100.224). A hearing officer was appointed, and after a duly noticed public hearing, he recommended that Petitioner's

business license be revoked because the theatre was located within 500 feet of an area zoned for residential use and within 1,000 feet of a public school in violation of the provisions of Section 9120.41.

On May 9, 1978, the City Council held a public hearing to consider the recommendation of the hearing officer. The City Council concurred in that recommendation and revoked Petitioner's business license effective June 10, 1978. Thereafter, Petitioner sought judicial review.

## ARGUMENT

### I

### THE ZONING ORDINANCE IS A VALID EXERCISE OF THE POLICE POWER

Section 9120.41 [1/] of the Long Beach Municipal Code is part of the Zoning Regulations of the City and is patterned after the Detroit ordinance which was

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1/ Renumbered as § 9120.17, effective May 4, 1979; however, to avoid confusion, the previous section number (§ 9120.41) will be used.

upheld in Young, supra.

The zoning ordinance establishes specific "locational" regulations for "adult entertainment" businesses, as defined, which are primarily devoted to the sale, display, or exhibition of matter relating to "specified sexual activities" or "specified anatomical areas" as defined. These locational requirements are superimposed like an overlay on underlying land-use districts. The ordinance provides a procedure for obtaining a zoning exception after a public hearing, which is designated as a "waiver of locational provisions." "The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area." The ordinance also seeks to protect surrounding neighborhoods from the "deleterious and adverse effects" of such businesses [§ 9120.41(a)]. 2/

The ordinance, per se, does not prohibit or prevent the operation or establishment of an adult motion picture theatre. It merely restricts the location of such an establishment, which is a traditionally accepted zoning function

since Euclid v. Ambler Realty Co. (1926) 272 U.S. 365; 71 L.Ed. 303, and Miller v. Board of Public Works (1925) 195 C. 477.

Thus, the ordinance regulates the commercial use of property, and as we will point out below, the city's governmental interest outweighs the incidental effect of the ordinance on First Amendment rights. In this context, it is firmly established that "[p]roperty rights must yield to the public interest served by zoning laws. . . ." (Robins v. Pruneyard Shopping Center [1979] 23

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2/ The "locational" requirements provide that "it shall be unlawful to establish any such 'adult entertainment' business if the location is:

"1. Within five hundred feet of any area zoned for residential use;

"2. Within one thousand feet of any other 'adult entertainment' business; or

"3. Within one thousand feet of any public or private school, park, playground, public building, church, any non-commercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors."

C.3d 899, 906; 153 Cal.Rptr. 854.)

The law in California is that legislative zoning decisions are not subject to judicial interference as long as the propriety of the regulation remains a question upon which reasonable minds might differ. (Associated Homebuilders, Etc., Inc. v. City of Livermore [1976] 18 C.3d 582; 135 Cal.Rptr. 41; Clemons v. City of Los Angeles [1950] 36 C.2d 95; 222 P.2d 439.)

This Court has likewise taken a broad view of the application of local police power to zoning regulations. Although it has considered the validity of zoning regulations on only a few occasions, it has consistently upheld such regulations and given the police power broad and liberal construction. (Village of Euclid v. Ambler Realty Company, supra, [1926] 272 U.S. 365; 71 L.Ed. 303; Village of Belle Terre, et al. v. Boraas, et al. [1974] 416 U.S. 1; 39 L.Ed.2d 797.

This judicial policy of deference to legislative zoning decisions was again demonstrated in Young v. American Mini Theatres, supra, at 427 U.S. 71:

". . . It is not our function to appraise the wisdom of its decision to require adult theatres to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (Emphasis added.)

The city's governmental interest in preserving the quality of life, the total community environment, and the tone of commerce is given high priority by this Court.

Justice Powell, in Young, describes these governmental interests in this manner:

". . . Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve

> the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' Village of Belle Terre v. Boraas, 416 US at 13, 39 L Ed 2d 797, . . . ." [Emphasis added.] (427 U.S. at p. 80; 49 L.Ed.2d at p. 332.)

Only a naive person cannot see the blighting and deleterious side effects of the commercial exploitation of materials involving "specified sexual activities" or "specified anatomical areas" on adjacent neighborhoods in central cities throughout the country.

Chief Justice Burger in Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49; 37 L.Ed.2d 446 puts it this way:

> "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such

> a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."

Petitioner argues that the City could not adopt the ordinance because it had not conducted an independent study (gathered conclusive evidence or empirical data?) to justify its adoption. But, another study would be a wasteful duplication of effort. In order to "experiment with solutions," the City can look to the experience of other cities like Detroit, Los Angeles and Boston (where all adult entertainment businesses were concentrated in one area) to justify the need for an ordinance to remedy or prevent the problems of blight experienced by such cities; see Whalen v. Roe (1976) 429 U.S. 580; 51 L.Ed.2d 64.

As a final word on this subject, we again turn to the Paris Adult Theater case, supra, 413 U.S. 49; 37 L.Ed.2d 446 at pages 458 and 459:

> "But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf

> of the petitioners that, absent such a demonstration, any kind of state regulation is 'impermissible.' We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.
>
> * * *
>
> "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . ."

If the legislative body determines that residential neighborhoods should be protected from the deleterious side effects of adult entertainment businesses, it then may draw the applicable line of demarcation (Village of Belle Terre v. Boraas, supra, [1974] 416 U.S. 1; 39 L. Ed.2d 79). This is a proper legislative function and courts usually do not question the wisdom of such decision.

The Detroit ordinance also contained a provision prohibiting an adult entertainment business within 500 feet of an area zoned for residential use. The

Petitioner erroneously concludes that this provision was disapproved by this Court. Actually, the provision was not contested because Detroit amended its ordinance to include the more precise designation of land zoned for residential use instead of land used for residential purpose (Young, supra, 427 U.S. 50 316, fn. 2; 49 L.Ed.2d 310).

## II

## THE ORDINANCE DOES NOT UNCONSTITUTIONALLY RESTRICT FIRST AMENDMENT RIGHTS AND THERE IS A RATIONAL BASIS FOR ITS ADOPTION

The subject ordinance does not in any way censor or ban any type of expression. It merely controls the places where commercial land uses which sell sexually explicit materials or entertainment can be located. Petitioner is not denied access to the market nor is the public unable to satisfy its appetite for sexually explicit material or entertainment.

From the very inception, zoning ordinances have imposed locational restrictions on all types of land uses.

It is beyond dispute that a zoning ordinance may permit bookstores, movie theatres, or other commercial enterprises which disseminate material protected by the First Amendment in certain zones and prohibit them in others without violating the First Amendment.

In Young, supra, this Court upheld zoning restrictions on the location of "adult entertaiment" businesses essentially identical to those in the Long Beach ordinance. The "majority opinion" is composed of a plurality opinion by Justice Stevens speaking for four justices and of a concurring opinion by Justice Powell.

Both Justice Stevens' and Justice Powell's opinions conclude that the Detroit ordinance does not unconstitutionally restrict First Amendment rights. Justice Stevens reasoned that just as a city may, and usually does impose licensing and locational restrictions in general without running afoul of the prior restraint doctrine, so may a city impose special licensing and locational restrictions on adult theatres. The Court further reasoned that no prior

restraint results from such locational and licensing restrictions so long as they do not have the effect of denying distributors of adult films access to their market. (Young, supra, 427 U.S. 62-63; 49 L.Ed. 2d 321-322.)

Having concluded that the Detroit ordinance does not violate the First Amendment, Justice Stevens then concludes that it does not violate the Equal Protection Clause on the ground that the content of the materials disseminated by sexually explicit businesses may be used to classify said business differently than similar businesses which sell non-erotic materials. In doing so, Justice Stevens applied the rational basis test. (Young, supra, 427 U.S. 70-72; 49 L.Ed. 2d 326-327.)

Justice Powell concurs with the plurality opinion that the ordinance does not violate the First Amendment. He concludes that the ordinance imposes typical time, place and manner restrictions common to zoning ordinances. However, he believes the ordinance does not regulate "adult businesses" because of the content of the materials they dis-

seminate, but rather because of the deleterious effect these businessses have on their surroundings, an effect which is markedly different from other types of businesses. (Footnote 6, 427 U.S. 83; 49 L.Ed.2d 333.) He differs with the plurality opinion in its holding that non-obscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression. (Footnote 1, 427 U.S. 73; 49 L.Ed.2d 327.) Without needing to resort to the hypotheses that erotic non-obscene materials are less fully protected than, for example, political speeches, Justice Powell found the ordinance supportable simply by application of the balancing test derived from United States v. O'Brien (1968) 391 U.S. 365; 20 L.Ed.2d 672.

Although the plurality and concurring opinions differ somewhat in approach and analysis, they concur in the determination that the Detroit ordinance does not violate the First Amendment, and that "[a]t most the impact of the ordinance on those interests is incidental and minimal."

Other jurisdictions which have considered Young have found it dispositive. In Northend Cinema, Inc. v. City of Seattle (1978) 585 P.2d 1153, 1158, the Washington Supreme Court, in considering the constitutionality of a Seattle zoning ordinance requiring that adult movie theatres be located in one zone, found Young to be dispositive, stating:

> "We need not, of course, construe the provisions of our state constitution identically with the corresponding provisions of the federal constitution. Darrin v. Gould, 95 Wash. 2d 859, 868, 540 P.2d 882 (1975). In this case, however, we find the reasoning of Young persuasive. It acknowledges and accommodates the important interest of the state in exercising its police power to protect city neighborhoods against degradation, while preserving the democratic principles the constitutional provisions were designed to protect. We therefore find it appropriate to apply the general rule that language in our state constitution will be given the same interpretation as that given the federal constitutional provision by the United States Supreme Court."

The court then reviewed the specific

provisions of Seattle's zoning ordinance and concluded as follows:

> "We conclude the city's paramount interest in protecting, preserving, and improving the character and quality of its residential neighborhhods is sufficient to justify this non-discriminatory zoning regulation of adult movie theatres. We find no violation of First Amendment or equal protection guarantees."

The Supreme Court of Georgia also found Young dispositive in Airport Bookstore, Inc. v. Jackson (1978) 248 S.E.2d 623. This case involves an ordinance of the City of Atlanta which requires licensing of certain sex related businesses. The Court relies on Young and states as follows with reference to Young:

> "The court held that even though a city could not suppress adult films, it could place them in a different classification from other films and regulate them. Thus, the City of Atlanta is not prohibited by freedom of speech or equal protection considerations from classifying adult bookstores, adult motion picture theatres, and adult entertainment establishments differently from other book-

stores, theatres and places of entertainment, and thereafter regulating them."

## III

## THE ORDINANCE IS NEITHER VAGUE NOR OVERBROAD

Petitioner contends that the ordinance under scrutiny is vague as to what constitutes adult entertainment and how the locational requirements are applied.

A similar argument on vagueness was rejected in Young (427 U.S. at pp. 58-61; 49 L.Ed.2d at pp. 319-321) because the ordinance was unquestionably applicable to the theatre owner, and since the ordinance did not "have a significant deterrent effect on the exhibition of films protected by the First Amendment," the theatre owner did not have standing to raise "the hypothetical claims of persons not before the Court."

This Court also noted that the doctrine of constitutional vagueness is not applicable "if the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and

if the statute is 'readily subject to a narrowing construction by the state courts.'"

Because this zoning ordinance explicitly authorizes the exhibition of adult movies and other adult uses at numerous locations in the City, the ordinance does not have a "significant deterrent effect on the exhibition of films protected by the First Amendment."

The question of vagueness cannot be viewed in a vacuum, and mathematical precision is not required (Rose v. Locke [1975] 423 U.S. 48; 46 L.Ed.2d 185).

The subject ordinance defines "adult motion picture theater" as a building used for "presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' for observation by patrons therein." [§ 9120.41(b)1B.]

This definition is identical to the Detroit ordinance and is directed against presenting material which emphasizes "specified sexual activities" or "specified anatomical areas."

In construing the language of a statute, a court may cure any uncertainty by "appropriate interpretation" and should apply the general principle that "legislation should be construed, if reasonably possible, to preserve its constitutionality" (Kash Enterprises, Inc. v. City of Los Angeles [1977] 19 C.3d 294, 305; 138 C.R. 53).

Thus, the reference to a "public or private school" can be narrowly construed by a court to exclude an institution of higher learning. This does not help Petitioner because its theatre is also located less than 500 feet from a residentially zoned area.

Petitioner also complains that the locational requirement referring to an establishment "likely to be used by minors" is vague. If this is so, the ordinance would still be subject to validation by judicial construction through the "simple expedient of excising the offending provisions." (Welton v. City of Los Angeles, [1976] 18 C.3d 497.) The severance of this provision would in no way affect the remainder of the ordinance. (Renba Lil v. Kortz [1976] 65

C.A.3d 467; 135 C.R. 287.)

It is submitted that the Long Beach ordinance is "reasonably susceptible to an interpretation consistent with the Constitution;" and may be construed to limit its effect and operation to matters that may be constitutionally regulated or prohibited.

## IV

## THE ORDINANCE DOES NOT DENY ACCESS TO PROTECTED EXPRESSION

Petitioner argues that the ordinance denies patrons access to the adult entertainment market.

In the criminal trial, it was brought out that Petitioner owns and operates an additional "adult" movie theatre in Long Beach besides the theatre involved in this case. Certainly, it has not been denied access.

Many other adult movie theatres, adult bookstores, adult hotels and motels, etc., are currently in existence in this City to provide access to citizens seeking such entertainment.

In the criminal appeal, the City Prosecutor lodged with the Appellate Department of the Superior Court facts from the Police Department which specified the kinds and numbers of "adult entertainment" businesses currently available in the City of Long Beach:

> " . . . [W]e find that Long Beach currently has fourteen (14) adult bookstores, seven (7) adult motion picture theaters (including mini motion picture theaters), four (4) adult motels, several adult motion picture arcades . . . no (0) cabarets, seventeen (17) massage parlors, one (1) adult model studio, no (0) sexual encounter centers, and one (1) retailer of adult video-tape movies. Within the foregoing is a recently established massage parlor which was granted a license pursuant to the 'waiver' sections, § 9120.41(d)."

Petitioner claims that the ordinance restricts access by its nearly "total ban on new adult theatres." But, it acknowledges that potential sites would still exist in several commercial nodes and in industrial areas of the City. As such, its argument that the ordinance acts as a total "ban" is without merit.

Choice commercial areas are for the most part fully developed. At the present time, it would be difficult to build a new theatre in those areas even for the showing of "family" movies. This is an economic problem relating to the scarcity of land, which was not created by this ordinance.

As commercial areas are recycled (e.g., a Long Beach redevelopment project has now cleared for development over twenty-two acres in the downtown commercial area), more land will be made available. Even on vacant industrial sites, a person could build a theatre and provide abundant parking and other amenities which are lacking in old theatres. Since this is a highly mobile society, any patron who is interested would have no trouble driving anywhere in the City for adult entertainment.

Most new theatres are being built as part of shopping centers. A proprietor could lease or build at such locations and exhibit adult films.

Petitioner has not demonstrated that sites for building new theatres are not available. His allegation really

revolves around economic considerations. In that regard, we quote from Justice Powell in Young, supra, at 427 U.S. 78:

> ". . . The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. . . "

## V

## THERE IS NO EXCESSIVE OR UNBRIDLED DISCRETION VESTED IN ANY ENFORCEMENT OFFICER OR BODY

Petitioner contends that the ordinance gives unlimited and impermissible discretion to the Planning Commission in applying the "waiver" provisions.

In so doing, Petitioner would lead this Court to believe that it is dealing with some sort of censorship statute instead of a zoning ordinance.

The ordinance in question is not a licensing or permit issuing regulation.

Neither the City Council, the Planning Commission, nor any city official, has any authority thereunder to issue a license or permit as a precondition to the exercise of First Amendment Rights.

The license which was revoked in this case is a business license which is required of all persons doing business in the City. It is a revenue producing measure and is administered and issued by the City Tax Collector (§ 6000.8 L.B.M.C.), not by the City Council or the Planning Commission.

The business license is issued subject to all applicable laws including zoning and building regulations, and the Tax Collector may not issue a business license if a business at a proposed location would violate the zoning laws (§ 6000.9 L.B.M.C. - formerly § 6100.191).

In the case at bar, upon discovery of the Petitioner's zoning violation, the City instituted proceedings pursuant to Section 6100.9 (formerly § 6100.224 L.B.M.C.) for the revocation of the business license. In addition, criminal action was brought against the Petitioner for the zoning violation.

Section 6100.9 permits revocation of a business license, after notice and public hearing, when a licensee violates any provision of the Municipal Code arising out of the operation of a business or where there are grounds that would warrant denial of the license if application were being made.

The revocation proceedings were conducted by the City Council, but that was its only involvement in the licensing issue. The Planning Commission was never involved in and has no authority over such licensing matters.

Most zoning ordinances have a provision which provides an administrative hearing procedure for the granting of exceptions to the established zoning. This procedure may be variously referred to as a variance, special use permit, or conditional use permit, among others. In the subject ordinance, the procedure is called a "waiver" mainly because the identical procedure labelled a "waiver" was approved in Young (427 U.S. at p. 54; 49 L.Ed.2d at p. 317).

A person is not entitled to a zoning exception or locational "waiver" as a

matter of right. It is only granted after certain findings are made by the Planning Commission after a public hearing.

The flexible standards contained in the ordinance for granting zoning exceptions have been uniformly approved by the courts. Thus, the "general welfare standard" was approved in Stoddard v. Edelman (1970) 4 C.A.3d 544; 84 C.R. 443, on pages 548 and 549:

> "The standard set by the Los Angeles Municipal Code is a 'general welfare standard.' . . . The code provides that the zoning administrator may issue a conditional use permit' . . . if he finds that the proposed location will be desirable to the public convenience or welfare and will be in harmony with the various elements and objectives of the Master Plan.' . . . At least two courts have squarely held that this ordinance is not too vague to be valid. . . . The Supreme Court sustained an even broader standard in a case involving San Francisco's building permit ordinance. . . . Against this background it is clear that petitioners' argument must fail. [Citations omitted.]"

In Schroeder v. Municipal Court (1977) 73 C.A.3d 841; 141 C.R. 85, an

ordinance which also indirectly affected free expression was challenged on the basis of vagueness. The ordinance prohibited the erection of radio and television antennae over specified heights "unless permitted" by the Planning Commission. The Court said in rejecting that challenge at page 848:

> "Appellant contends the ordinance is invalid because it prescribes no standards whereby he can obtain a variance from the city council allowing construction of an antennae higher than forty feet. He has cited no case, nor are we aware of any, requiring that a variance be provided when the basic ordinance is reasonable in its effect."

Since Petitioner would have no grounds for objection if there were no waiver provisions contained in Section 9120.41, it cannot object to the existence of a waiver provision, however vague, as being invalid on its face in view of the reasonable effect of this ordinance, to preserve and protect neighborhoods. When the waiver provisions are read in the context of the ordinance as a whole and not viewed as

isolated phrases, there is no vagueness.

## VI

## PETITIONER DID NOT HAVE A NONCONFORMING ADULT ENTERTAINMENT USE ON THE EFFECTIVE DATE OF THE ORDINANCE, AND THE ORDINANCE WAS NOT APPLIED RETROACTIVELY

Petitioner states that after the issuance of the business license, the City was precluded from applying the subject ordinance against it. This too is without merit.

On or about August 16, 1977, Petitioner made a written application to the City Tax Collector for a business license to operate a motion picture theatre.

When applying for the license, Petitioner represented to the City that the theatre had been in existence for 25 years; that it was applying for a license as the new owner; that the nature of the business was motion picture theatre; and the type of motion picture to be shown would be "family" motion pictures.

In reliance on the information submitted, the application was processed, and on or about August 31, 1977, a motion picture theatre license was issued.

The City's inquiry into the "type" of motion pictures to be shown at the location was pertinent because it was widely known at that time that the City was considering the adoption of an adult entertainment ordinance.

Indeed, on September 6, 1977, the City Council passed temporary, emergency Ordinance No. C-5343, effective as of that date, which limited the location of specified "adult entertainment businesses" to particularly described locations. Section 9120.41, which was subsequently enacted, incorporated the requirements set out in Ordinance No. C-5343.

On October 25, 1977, Section 9120.41 was enacted and took effect on November 25, 1977.

Petitioner did not open its theatre for business until December 10, 1977, when it established for the first time an adult motion picture theatre use, and for the first time displayed motion

pictures of the character defined in Section 9120.41.

In zoning, the doctrine of nonconforming use is really a corollary of the vested rights concept. "'A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance.'" (Hill v. City of Manhattan Beach [1971] 6 C.3d 279, 285; 98 C.R. 785.)

> ". . . [L]andowners have no vested right in existing or anticipated zoning ordinances. [Citation omitted.] A purchaser of land merely acquires a right to continue a use instituted before the enactment of a more restricted zoning. . . ." (Morse v. County of San Luis Obispo [1967] 247 C.A.2d 600, 602.)

In the case at bar, to qualify as a nonconforming use, Petitioner would have had to establish an "adult motion picture theatre" use between August 31, 1977, when the business license was issued, and September 6, 1977, when the temporary, emergency ordinance was adopted.

However, Petitioner's "adult motion picture theatre" use was not established

until December 10, 1977, by which time a more restrictive zoning regulation was in effect. Thus, before the emergency ordinance and the new zoning ordinance became effective, Petitioner had made no use of its theatre, let alone an "adult motion picture theatre" use. Petitioner argues that it was "remodelling" the theatre so it immediately converted to an adult entertainment use. This strains common sense since "remodelling" is not a use but preparation for a use.

It is settled law that "nonuse is not a nonconforming use" (emphasis added) (Hill, supra, 6 C.3d at p. 286). Reliance on an unused business license, without more, does not establish a nonconforming use, and a "use" is not established at the time a business license is issued.

A business license does not control or supersede existing or future zoning regulations and does not legalize a use that is made improper by such regulations. It does not immunize a licensee's business from other applicable laws. (Benson v. City of Long Beach [1943] 61 C.A.2d 189.)

In summary, a business license cannot legalize a business activity which is prohibited by law, and the business license issued to the Petitioner in August did not give it the authority to violate the law in December.

Persons living in a city or having dealings with it are presumed to have knowledge of city ordinances (Sunset Amusement Company v. Board of Police Commissioners [1972] 7 C.3d 64; 101 C.R. 768).

Thus, on September 6, 1977, when temporary, emgergency Ordinance No. C-5343 became effective, Petitioner was constructively put on notice of its provisions.

Again, on November 25, 1977, when Section 9120.41 became effective, Appellant was put on notice that the establishment of an "adult motion picture theatre" at the subject location would be in violation of the ordinance.

A license may be revoked after its issuance if there is a compelling public necessity (O'Hagen v. Board of Zoning Adjustment [1971] 19 C.A.3d 151; 96 C.R. 484; Sunset Amusement v. Board of Police Commissioners, supra).

It is therefore submitted that the City ordinances in question were properly applied to the Petitioner's adult motion picture theatre; that the Petitioner did not establish a legal nonconforming use as an adult motion picture theatre; and that the business license was properly revoked.

## CONCLUSION

The Respondent Long Beach City Council respectfully requests this Court to deny the petition for a writ of certiorari because the decision below is consistent with and correctly interprets applicable law, both state and federal. No further statement by this Court is needed on any of the matters cited in the petition.

Respectfully submitted,
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